

Service Date: August 1, 1985

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER of the Application)	TRANSPORTATION DIVISION
of KELLER TRANSPORT, INC.,)	
Billings, Montana for a Class B)	DOCKET NO. T-8784
Certificate of Public Convenience)	
and Necessity.)	ORDER NO. 5647

* * * * *

PROPOSED ORDER

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APPEARANCES

FOR THE APPLICANT:

William E. O'Leary, O'Leary and McCarthy, Suite 4G, Arcade Building, 111 N. Last Chance Gulch, Helena, Montana 59601; appearing of behalf of Applicant, Keller Transport, Inc.

FOR THE PROTESTANTS:

Jerome Anderson, Anderson, Brown, Gerbase, Cebull and Jones, P.C., P.O. Drawer 849, Billings, Montana 59103; appearing on behalf of Protestant Dixon Bros., Inc.

David L. Jackson, Jackson, Murdo & Grant, P.C., 203 North Ewing, Helena, Montana 59601; appearing on behalf of Protestant Big Horn Transportation Company

FOR THE COMMISSION:

Timothy R. Baker, Staff Attorney, Public Service Commission, 2701 Prospect Avenue, Helena, MT 59620

BEFORE:

TOM MONAHAN, Commissioner and Hearing Examiner

The Hearing Examiner, having taken evidence and being fully advised in the premises, issues the following Proposed Findings of Fact, Conclusions of Law, and Order pursuant to Section 2-4-621, MCA.

BACKGROUND

1. On or about the 14th day of June, 1985, the Commission received an application from Keller Transport, Inc., 1305 Taylor Place, Billings, Montana (hereafter referred to as Applicant), for a Certificate of Public Convenience and Necessity, Class B, authorizing the transportation of chemicals, fertilizers, alcohols, and antifreeze, between all points in Montana. Temporary operating authority was granted by the Commission to the Applicant in July, 1985.

2. After publication, the Commission received several protests from authorized carriers. A notice of public hearing was issued under a service date of August 1, 1985. Pursuant to that notice, a hearing was conducted on August 20-21, 1985, in the Conference Room of the Commission offices, 2701 Prospect Avenue, Helena, Montana.

3. At the commencement of the hearing, the Applicant restrictively amended the commodity description in the application to delete the commodity "fertilizers" as an item which Applicant sought to transport as a result of its request for authority.

4. Upon conclusion of the hearing, the parties agreed to submit proposed orders and briefs to the Commission.

SUMMARY OF TESTIMONY

Testimony of Applicant's Witness

5. Harold "Red" Ankrum, president of the Applicant corporation, appeared and testified in support of the application. He tendered the following exhibits:

Exhibit No. 1: Applicant's equipment list.

Exhibit No. 2: Applicant's balance sheet as of June 30, 1985.

Exhibit No. 3: A digest of operating authority issued to the Applicant by this Commission under PSC No. 1060.

6. Under the authority of PSC No. 1060 as set forth in Exhibit No. 3, and as pertinent to this application, the Applicant engages in the transportation of petroleum and petroleum products as a Class B motor carrier between all points and places in Montana. In addition, Applicant also holds operating authority issued to it by the Interstate Commerce Commission authorizing operations as a motor contract carrier in the transportation of general commodities between all points and places in the adjacent 48 states. Applicant transports certain chemicals under that authority.

7. Mr. Ankrum described the Applicant's operations. The Applicant has terminals in Glendive, Billings, Bozeman, Helena, Missoula, Great Falls, Kalispell, Shelby, and Roundup. The majority of the Applicant's equipment is used for the transportation of petroleum products. The Applicant also possesses several insulated vans equipped with Thermal Kings, capable of either heating or cooling. These are commonly described as "reefer" trailers.

8. The Applicant also possesses 17 trailers which are designated as "clean" units, capable of being utilized to provide transportation of the commodities for which authority is sought. Their general capacity varies from 10,000 gallons to 13,000 gallons. Currently, said units are stationed at all of the Applicant's terminals except Roundup.

9. Essentially, the main terminal of the Applicant is in Billings. There are four employees who handle the billing, central dispatching, and compliance aspects of the Applicant's operations. Each of the other terminals consists of an owner-operator, who typically handles his own dispatching, maintenance, and hauling.

10. Mr. Ankrum also described the financial aspects of the Applicant's operations, in reference to Exhibit 2, which was taken from the books and records of the Company. During cross-examination, it became apparent that Mr. Ankrum's knowledge of the accounting procedures used in preparing Exhibit No. 2 was questionable.

11. According to Mr. Ankrum, the Applicant has held its interstate authority for general commodities for a period of just over a year. The Applicant obtained its intrastate authority in 1971, and has been providing service under that authority since that time. The Applicant also has approximately 30 or 32 leases with various owner-operators both intrastate and interstate. Mr. Ankrum stated that insurance for these lease operations is provided by the Applicant. In addition,

Mr. Ankrum stated that the Applicant actively enforces the safety regulations of the Department of Transportation.

12. On cross-examination, there appeared to be some confusion about the measure of safety training provided by the Applicant for its drivers. However, on redirect questioning, Mr. Ankrum clarified his position. Mr. Ankrum stated that the Applicant would be willing to restrict its application for authority to ethanol, fuel grade ethanol, methanol, glycols and antifreeze in bulk, and packaged chemicals. The shippers are relied on by the Applicant for the proper placards which indicate what is being transported. Mr. Ankrum supervises and instructs the Applicant's drivers in loading and unloading safety procedures. According to Mr. Ankrum, the Applicant's safety record in the past has been good, and the Applicant's drivers are experienced in the safe handling of petroleum and petroleum products. Mr. Ankrum also stated that should the requested authority be granted, the Applicant would check the applicable DOT regulations to ensure compliance.

13. Mr. Ankrum stated that the Applicant has been transporting ethanol for about four years. In addition, the Applicant had been hauling antifreeze for approximately six months. Mr. Ankrum testified that he has always known that the ethanol transported by the Applicant was produced from grain. However, Mr. Ankrum also stated that the ethanol is denatured prior to transportation. This is accomplished by the addition of petroleum.

14. Mr. Ankrum stated that all of this activity was performed under the Applicant's authority to transport "petroleum and petroleum products." Mr. Ankrum also testified that agents of the Applicant had informally contacted this Commission for an interpretation of the scope of this authority, but had not been provided an answer.

Testimony of Shipper Witnesses

15. Mr. Bruce Kania, Amsterdam, Montana, appeared and testified on behalf of the application. Mr. Kania is the president of AE Montana, Incorporated (hereafter AE Montana), a fuel grade ethanol distillery located in Amsterdam.

16. Mr. Kania stated that another name for fuel grade ethanol is alcohol. He further stated that the ethanol produced at the Amsterdam plant is derived from a biomass process, although the same product may be a hydrocarbon-based chemical. Mr. Kania anticipates that the future demand for ethanol will increase, because of the implementation of a gasoline lead phase down program by the federal government. This should lead to an increase in the use of ethanol as a substitute.

17. Currently, AE Montana ships ethanol intrastate to only Mountain States Petroleum, in Billings. According to Mr. Kania, should the lead phase down occur, and ethanol be used as a substitute, there would be other buyers in both Billings, and Great Falls. Approximately 90 percent of the ethanol produced at the Amsterdam plant is shipped interstate. Mr. Kania stated that approximately 11,500 gallons/month of ethanol is shipped intrastate to Billings.

18. Mr. Kania stated that AE Montana is the shipper of approximately 10 percent of the intrastate shipments. For these shipments they have used the Applicant on several occasions. Mr. Kania testified that the services provided by the Applicant have generally been very good. Mr. Kania stated that as a shipper, AE Montana has never utilized the services of either of the Protestants. He added that the decision by AE Montana to use the services of either of the Protestants would essentially be a business decision, contingent upon customer preference and the price being charged.

Mr. Kania also testified that all things being equal, he would prefer to continue to use the Applicant.

19. Mr. Kania also explained the process of denaturing the ethanol before it is shipped. The final product of denatured ethanol consists of approximately 6 percent gasoline. This is done to comply with federal regulations, and to avoid a tax on the transportation of alcohol. According to Mr. Kania, denatured fuel grade ethanol is classified as a petroleum product by the federal government.

20. Mr. Kania stated that gasoline is much more volatile than ethanol, making the handling of ethanol significantly safer than gasoline.

21. Mr. Kania also appeared and testified as a corporate representative of SCK Enterprises (hereafter SCK), of Butte, Montana. SCK packages various formulas for windshield wash, airbrake deicer, gasoline octane boosting additives, and gasoline deicers, which have been developed by the company. As part of this process, SCK purchases large quantities of methanol, or wood alcohol.

22. A portion of this methanol is usually purchased from Borden Chemical (hereafter Borden), in Missoula. When the methanol is purchased direct from Borden, SCK pays the shipping charges. Approximately half of these methanol purchases by SCK are made through Dyce Chemical (hereafter Dyce), for which Dyce pays the freight charges. The total shipments of methanol from Borden total approximately 23,000 - 30,000 gallons/year.

23. For the majority of the methanol loads to SCK, the Applicant's services were utilized. Mr. Kania stated that the services provided by the Applicant to SCK were generally very good, and that if the proper authority were granted, SCK would continue to use the Applicant.

24. Mr. James Diede, appeared and testified in support of the application. Mr. Diede is an agent for Dyce Chemical, Inc., a chemical distributor operating within the state of Montana. The main office of Dyce is located in Billings, and there are warehousing points for bulk storage in Billings, Great Falls, and Shelby.

25. Mr. Diede presented the operations of Dyce as they relate to their Shelby warehouse. Methanol is shipped to Shelby in rail cars, which are then used for storage. From Shelby, short hauls are made to various oil service companies and gas plants located in the general area of Shelby and Cut Bank. Dyce is the shipper of all of these loads. This market for methanol is very competitive, as there are several other suppliers that are able to service this area. The Shelby operations usually require a short response time for transportation service. The Applicant has a vehicle stationed in Shelby, which has been utilized in the past. Approximately 12-15 truckloads of methanol were shipped from the Shelby facility last year.

26. Mr. Diede testified that when the decision was made to base bulk storage operations in Shelby, he considered utilizing the Protestant Dixon Bros., which was based out of Great Falls. In the final analysis, the Protestant's services were not utilized, however, primarily because of both the deadhead cost from Great Falls to Shelby, and the need for a short response time. However, on cross-examination, Mr. Diede admitted that these were essentially his own assumptions, with no confirmation from any agents of the Protestant, Dixon Bros., Inc.

27. Dyce also ships methanol from both Borden in Missoula, and its warehouse bulk storage facility in Billings. From those origin points, Dyce essentially ships on a statewide basis, although some areas are only served occasionally. The services of the Applicant have been utilized for many of these shipments. Approximately half of the shipping needs of Dyce in this regard are

met by their own transportation equipment. Between four and eight truckloads of methanol were shipped from Missoula last year, and approximately six loads were shipped from Billings. A load is approximately 7,500 to 8,000 gallons. For these loads, Dyce is the shipper approximately 99 percent of the time.

28. Dyce also ships other commodities intrastate, including ethylene glycol, triethylene glycol, propylene glycol, and antifreeze, all in bulk. The origin point for such shipments is Billings, and the destinations are essentially statewide. Dyce ships anywhere from 250,000 to 750,000 gallons of these commodities per year. Of this amount, roughly 50 percent is shipped intrastate. Between 10-12 truckloads of these commodities were shipped from Billings last year. A load is approximately 5,000 gallons.

29. Dyce has used the Applicant's services, both on an interstate and intrastate basis. The Applicant has provided very satisfactory service at both levels. All of the transportation by the Applicant for Dyce of the above-described commodities has been in bulk. All things being equal between the services of the Protestants and the Applicant, Mr. Diede testified that Dyce would prefer to continue using the Applicant, because of the good working relationship that has developed.

30. Mr. Diede stated that Dyce has been solicited by the Protestant Dixon Bros., on several occasions. However, he could not provide any detail as to the substance of any of those contacts. In general, Mr. Diede stated that he would have no objections to using the services of the Protestant Dixon Bros., as long as they could meet his needs. Mr. Diede could not point to any specific instances where the services of the Protestant Dixon Bros. were not satisfactory.

31. Mr. John Cleveland, appeared and testified in support of the application. He is an agent for West-Chem Ag Chemicals, Agricultural Chemicals (hereafter West-Chem) in Billings,

Montana. West-Chem is a wholesale agricultural chemical distributor. The service area of West-Chem encompasses the entire State of Montana, with warehouse distribution points in Billings, Shelby, Havre, and Wolf Point. Approximately 75 percent of the intrastate shipments originate in Billings. Primarily, West-Chem sells to approximately 400-450 agricultural chemical retailers across Montana. West-Chem pays the freight on all shipments.

32. Generally, West-Chem distributes pesticides, including herbicides and insecticides. They can be shipped in either dry or liquid form. There is no bulk shipping. All pesticides are packaged. Shipment weights vary between 50,000 pounds and 35,000 pounds, but there are numerous shipments in the neighborhood of 100-200 pounds as well.

33. Mr. Cleveland testified that in order to protect the chemicals from the weather, it was necessary that they be transported in a closed-type van with both heating and cooling capability. The peak demand for West-Chem's products is from the first of March to the first of July, depending upon weather conditions. During this period, there would be a minimum of one load per day, at a maximum there would be six.

34. West-Chem also has transportation needs during the remainder of the year as well. The majority of these are interstate in nature.

35. West-Chem also solicits carriers for "peddle runs." On these hauls a truck will stop at various dealers enroute to its ultimate destination, thus serving many different communities.

36. Mr. Cleveland stated that West-Chem has utilized the Applicant's services. The service of the Applicant was very satisfactory. Further, Mr. Cleveland stated that if the Applicant were given the necessary authority, West-Chem would use their services, which are primarily needed only during the peak season.

37. Mr. Cleveland also testified that on separate occasions West-Chem had been solicited by both of the Protestants. However, Dixon Bros., Inc. could only provide bulk service, which was not needed. West-Chem was solicited by Big Horn shortly after the Applicant was granted temporary authority. However, they did not possess the protective services (ie, heated vans) which are required by West-Chem for safe transportation of its pesticides. However, if the proper equipment were provided by Big Horn, Mr. Cleveland stated that there would be no objection to using their services.

38. Mr. Paul Havig, appeared and testified in support of the application. He is the marketing and transportation director for Mountain States Petroleum Corporation (hereafter Mountain States), Billings, Montana. Mountain States serves as a distributor for Whitco Chemical of California, and operates Bair's Truckstops and service stations throughout Montana and Wyoming.

39. Mountain States is involved in the shipment of significant amounts of denatured ethanol. The ethanol is manufactured by AE Montana, in Amsterdam, Montana, and by Alcotech, in Ringling, Montana. Mountain States is the shipper for all of the shipments from the Ringling plant, and 75-90 percent of the shipments from Amsterdam. Approximately 30,000 gallons/month of ethanol is purchased by Mountain States from the two plants. About 90-95 percent of that monthly total is from Amsterdam and the remaining 5-10 percent is from Ringling. Each shipment consists of 7,700 gallons. Roughly one-half of the shipping needs of Mountain States are satisfied by their own equipment.

40. Mountain States has utilized the services of the Applicant on several occasions, and has found those services to be very satisfactory. The Applicant is keyed into Mountain States

facilities, and has served as their primary carrier for several years. Mr. Havig stated that it has essentially been a business decision for Mountain States to continue to utilize the Applicant's services, despite solicitation efforts from other carriers. Mr. Havig also stated that if the requested authority were granted, they would continue to utilize the Applicant's services.

41. Mountain States has been solicited on several occasions by the Protestant, Dixon Bros. Mr. Havig stated that Mountain States has never been solicited by Dixon Bros. for the transportation of ethanol, but added that he had not informed them of the need for that service. Mr. Havig also stated that he was aware that the Protestant Dixon Bros. has the equipment necessary to transport ethanol.

42. Mr. Havig testified that his first solicitation contact with Big Horn was on the first day of this hearing. Mountain States has never used the services of the Protestant Big Horn.

Motion to Dismiss by Protestants

43. At this point in the proceedings, the Protestants Dixon Bros. and Big Horn moved to dismiss the Applicant's case, as the Applicant failed to meet its statutory burden of proof. This motion was based upon a number of grounds. First, the Protestants moved that there had been no showing that existing carriers were allowed to participate in the traffic described by the supporting shippers. Second, the Protestants contended that the Applicant's case has been built upon illegal activity, which should not be considered by the Commission.

44. The Applicant responded to this motion by arguing that the Protestants either do not have the equipment to meet the shipper's needs, or have not made it available to the shippers. Therefore, the standard principal that existing carriers must be first given the right to haul is not

applicable. In addition, the Applicant has made an effort to get a ruling from this Commission as to the scope of his authority. Further, it is not clear how the commodities at issue here are classified.

Given this ambiguity, it is obvious that the Applicant has been acting in good faith, and that there has been no illegal activity since there is no violation of clear Commission policy.

Testimony of Protestants

45. Mr. George Graham, appeared and testified in opposition to the application. Mr. Graham is a marketing agent for the Protestant Big Horn Transportation Company, Billings, Montana. He tendered the following exhibits:

Exhibit A: Intrastate Authority PSC No. 7267, of the Protestant Big Horn. Among other things, it authorizes the Protestant Big Horn to transport chemicals between all points and places within the state of Montana, Class B.

Exhibit B: An equipment list for the Protestant Big Horn as of July, 1985.

46. Mr. Graham also stated that Big Horn holds general commodity interstate authority for the contiguous 48 states. On an intrastate basis, Big Horn specializes in bulk commodities, including acids and chemicals.

47. Mr. Graham described the equipment operated by Big Horn capable of hauling the commodities at issue in this proceeding. The units included a stainless steel bulk trailer (capacity 6,000 gallons) which is leased, and ten (10) DOT certified plastic chemical tanks (capacity 600 gallons each) which mount on a flatbed trailer unit. In addition, Big Horn also operates an aluminum trailer, which is currently stationed in Missoula.

48. Mr. Graham testified that Big Horn does not possess any heated van units, as described by Mr. Cleveland of West-Chem. However, he expressed the willingness of Big Horn to acquire such equipment, in order to serve West-Chem.

49. Mr. Graham also provided a general description of Big Horn's operations. In Billings, there is a large office for central dispatching services. There is also a complete maintenance shop, and Big Horn has made provisions for maintenance in various locations away from Billings. Big Horn also has a fairly extensive safety program, with weekly vehicle inspections.

50. Mr. Graham also described Big Horn's solicitation program. According to Mr. Graham, with the exception of Mountain States, all of the shipper witnesses have been solicited by Big Horn. Mr. Graham stated that he was unaware that Mountain States was a shipper of ethanol. For the most part, these solicitation efforts have not produced any additional business.

51. Mr. Graham testified that Big Horn would be willing to station equipment wherever it was needed, such as Shelby. He also stated that Big Horn currently has idle equipment.

52. Mr. Loren K. Knittel, appeared and testified in opposition to the application. Mr. Knittel is the traffic manager for the Protestant Dixon Bros. He tendered the following exhibits:

Exhibit C: Intrastate Certificate of Public Convenience
and Necessity, PSC No. 3760, which authorizes
Dixon Bros. to transport acids and chemicals
between points and places in the state of
Montana.

Exhibit D: A single page document titled Dixon Bros.,
Inc., Terminals, showing the location of
Dixon's terminals.

Exhibit E: An equipment list for Dixon Bros.

53. Mr. Knittel provided general background information as to the operations of Dixon Bros., Inc. Dixon Bros. also operates under interstate authority for chemicals and has transported

the commodities at issue here on a number of occasions. They have intrastate terminals at Great Falls, Billings, Cut Bank, Missoula, and Helena. Dixon Bros. also possesses intrastate authority for petroleum and petroleum products, Class B, between all points in Montana. They operate a number of units capable of transporting the commodities at issue in this proceeding, including several aluminum tank trucks and trailers. Dixon Bros. has implemented a thorough safety program. All of their transportation authority is limited to bulk operations.

54. Mr. Knittel testified that Dixon Bros. has solicited Dyce Chemical on several occasions. In regards to the needs of Dyce in Shelby, Montana, Dixon Bros. could provide service either from Great Falls or Cut Bank. Apparently, Dixon Bros. was not aware of the needs of AE Montana or SCK Enterprises until the hearing.

55. In general, and with the exception of the needs of West-Chem for transportation of packaged commodities, Dixon Bros. has the equipment to serve the needs of the supporting shippers.

DISCUSSION AND ANALYSIS

56. As a preliminary matter, the Protestants have alleged that the Applicant's prior operations were illegal, and therefore the application should be dismissed. The Applicant counters that its prior conduct does not violate any clear Commission policies or rules and is therefore not illegal. In addition, the Applicant claims that any illegal activity was conducted in good faith, and should accordingly not bar the application.

57. In the past it has been the position of the Commission that unauthorized operations are not, as a matter of law, a total bar to an application for authority, provided that they were either

conducted under a color of right, or in good faith. See In the Matter of John D. Walker, Docket No. T-5883, Order No. 4217. See also D.F. Bast, Inc. v. Pennsylvania Public Utility Commission, 154 A.2d 505, 31 PUR 3d 473 (PA. 1959). In this case, the Commission need not reach the issue of whether or not the Applicant's prior activities were actually illegal. The positions of the various parties to this action demonstrate that there is considerable confusion surrounding the classification of the commodities at issue. Even several of the shipper witnesses were unable to provide an answer to this question. Accordingly, it is the Commission's conclusion that the prior activities of the Applicant which are now questioned by the Protestants were conducted in good faith. So even if the prior activities were in fact illegal, they will not bar further consideration of this application.

58. In its brief, and oral argument made at hearing, the Applicant places great reliance upon its informal telephone conversations with staff members of the Commission, regarding the scope of its authority to transport "petroleum and petroleum products." The Applicant is well advised not to place great emphasis upon these communications. "Informal" contacts with the Commission have no value, even for a theory of reliance. The Commission has specific procedural methods which must be instituted in order to secure a formal ruling. To give any value whatsoever to informal opinions given by staff members over the phone, in correspondence, etc., undermines this entire process.

59. The Commission must consider several elements in judging an application for a Certificate of Public Convenience and Necessity. The threshold determination to be made is that of the Applicant's fitness, i.e., whether or not it is a suitable carrier to operate in Montana. In examining this element, the Commission chooses to view all aspects of a carrier's fitness together; these include financial fitness, intent to serve, experience and availability of equipment, as well as

the nature and extent of any past illegal operations. The Applicant's prior operations, whether illegal or not, were conducted in good faith. Regardless of the extent of those particular operations, the Applicant maintains a statewide transportation service. The Applicant's list of equipment, both owned and leased, is quite extensive. The Applicant has operated intrastate since 1971, and has interstate authority for the adjacent 48 states. Mr. Ankrum, who represented the Applicant at hearing, displayed little knowledge of the procedures used to prepare the Applicant's financial data. Nevertheless, from the substance of the data presented, it is clear to this Commission that the Applicant's operation is financially sound. In summary, a viewing of the Applicant's past operations, together with the financial data and testimony received at the hearing, provides ample evidence of fitness and ability. The Commission specifically finds that the Applicant is fit and able to undertake operations pursuant to the authority applied for.

60. The next question is whether or not public convenience and necessity require that we grant the requested authority. Section 69-12-323(2), MCA, provides:

If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefore shall be issued. In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

The questions to be considered in determining public convenience and necessity, implicit in the statute, were best stated in the case of Pan American Bus Lines Operation, 1 M.C.C. 190 (1936):

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

1 M.C.C. at 203.

61. The first consideration in determining public convenience and necessity, then, is consideration of shipper needs (ie, whether there is a public demand or need). In this case, four shipper witnesses representing five shippers supported the application.

62. Without belaboring the point with a lengthy review of all of the testimony presented at the hearing, the Applicant has established a public demand or need for the proposed services. Taken collectively, the testimony of representatives from AE Montana, SCK Enterprises, Dyce Chemical, Inc., and Mountain States Petroleum clearly establishes a general public demand and need for transportation services relating to the movement of ethanol and methanol from various points within the State of Montana. This finding is further supported by the fact that, in all likelihood, the future market and demand for these products will be much greater than it is now.

63. The testimony of Mr. Diede, on behalf of Dyce Chemical, Inc., provides sufficient evidence upon which to base a finding of public demand and need for the services proposed by the Applicant as they relate to the glycols (ethylene, triethylene, propylene) and antifreeze, all in bulk. According to Mr. Diede, Dyce Chemical ships between 250,000 and 750,000 gallons of the

commodities every year. Of this amount, approximately 50 percent moves intrastate. Typically, the origin point of such shipments is Billings, to destination points statewide.

64. Likewise, the testimony of Mr. Cleveland, on behalf of West-Chem, also provides a basis for a finding of public demand and need relating to the transportation of the various pesticides distributed by West-Chem, all in packages and containers. According to Mr. Cleveland, the shipping needs of West-Chem involve the movement of between one to six loads per day. In addition, the shipping needs of West-Chem require the use of specialized equipment, enclosed vans capable of heating or cooling. Approximately 75 percent (75%) of these intrastate shipments originate in Billings, with destination points statewide.

65. Since the Commission has determined that a public demand and need exists for the Applicant's proposed services, it is now appropriate to consider whether or not that public demand or need is satisfied by the existing carriers. At this point in time, it is important to reflect upon the relevant language of Pan-American Bus Lines, *supra*. The standard set forth therein explicitly states that the focus is on "whether [the public purpose] can and will be served as well by existing lines of carriers;" *Id.* at 203.

66. At the hearing, the Applicant argued that this consideration had been misinterpreted by the Protestants. Specifically, Applicant's counsel stated that:

There has been a misinterpretation consistently through this proceeding that merely because there's other carriers with some authority that they have an absolute right to provide the service. That is only true if in fact other things are equal, namely availability of equipment and solicitation of work and a willingness to provide the service. . . .if this is not the case, then the standard principle that existing carriers must be first given the right to haul is not applicable in this proceeding. (TR 243)

67. The reasons for this argument by the Applicant are obvious. The record in this proceeding clearly reveals that, with the exception of the shipper West-Chem, none of the Protestants have been given the opportunity to meet the shipping needs of the supporting shippers, as they relate to the commodities at issue. However, the Applicant's interpretation of this standard is somewhat specious. It is true that if the existing carriers do not show a willingness to provide the service in question, then it can be concluded that the public demand and need is not being satisfied. However, it is implicit in this reasoning that the existing carriers must first be given the opportunity to provide service. The Applicant's argument seems to contend that a lack of willingness to provide service will preclude the right to provide service. But the right to provide service must exist before it can be concluded that there is an unwillingness to provide it. This reasoning finds support in Section 69-12-323(2), MCA, which provides in pertinent part as follows:

. . . . In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished. . . .

68. In this proceeding, and with exception to the shipping needs of West-Chem, the Protestants have clearly expressed their desire to serve the supporting shippers. Between their two respective organizations, they have the equipment necessary to service the existing needs of those potential customers. However, as reflected in the testimony from the hearing, the Protestants have not been given the opportunity to provide the service at issue.

69. The Protestant Dixon Bros., Inc. has solicited Dyce Chemical regarding the traffic at issue in this proceeding. There was no response from Dyce to these efforts. Essentially, Mr. Diede assumed that Dixon would not be able to meet their needs. Dixon Bros. had never solicited

Mountain States for the transportation of ethanol. Mr. Havig stated that Dixon Bros. had contacted Mountain States on several occasions, but he had never informed them of their need for ethanol transportation. On behalf of Dixon Bros., Mr. Knittel testified that until the hearing, they were not aware of either AE Montana or SCK Enterprises.

70. The Protestant Big Horn Transportation Co. has solicited all of the supporting shippers, with the exception of Mountain States. Mr. Graham, on behalf of Big Horn, stated that they were not aware that Mountain States shipped any ethanol. Big Horn's solicitation efforts have not resulted in any ethanol traffic.

71. In summary, with exception of West-Chem (discussed below), the Applicant has failed to meet the second requirement of the Pan-American test, and has thus not satisfied the requirements of Section 69-12-323(2), MCA. It is clear that the existing carriers have not been given the opportunity to meet the demands and needs of the above-mentioned supporting shippers. Therefore, as to the commodities involved (alcohols, glycols, antifreeze), the application must be denied.

72. The needs of West-Chem however, present a different situation. Their traffic is limited to packaged pesticides, both in dry and liquid form. In addition, proper transportation of this commodity requires the use of specialized equipment, namely, enclosed vans with heating and cooling capabilities. The authority of the Protestant Dixon Bros. is limited to bulk commodities. Mr. Cleveland testified that West-Chem was solicited by the Protestant Big Horn after the Applicant received its temporary authority. Accordingly, those solicitation efforts are viewed as being made in anticipation of hearing, and are entitled to little weight. In any case, Big Horn's solicitation efforts

were fruitless, as they do not possess the specialized equipment required to service the needs of West-Chem. The Applicant possesses such equipment.

73. In summary, the shipping needs of West-Chem cannot be satisfied by existing carriers, although they have been given the opportunity to do so. Accordingly, with respect to West-Chem, the Applicant has satisfied the second requirement of the Pan-American test.

74. As to the shipping needs of West-Chem, and having made the two preceding findings, the Commission must now consider the impact upon operations of existing carriers of granting the Applicant this authority, and whether this impact is contrary to the public interest. The burden for establishing such an impact is on the Protestants. Conceivably, the award of the requested authority to the Applicant would affect the financial operations of the Protestants. However, no evidence was presented on this point. Regardless, for any such financial impact to be significant, it must be shown to be contrary to the public interest. Under this analysis, it is clear that existing carriers, by virtue of their authority, are thus protected against unfair or destructive competition, but not from the effects of competition itself. Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974). In light of this standard, the Commission finds no evidence of any impact upon the operations of the Protestants as a result of granting this authority to the Applicant, which would be contrary to the public interest.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.

3. That, as to the commodities at issue, there is a public demand and need for the transportation of the same.

4. That, with the exception of the shipping needs of West-Chem, the Applicant has not shown that the foregoing public demand and need is not being met by existing carriers and authorities.

5. That as to the shipping needs of West-Chem, the Applicant has established that the public demand and need is not satisfactorily met by existing carriers and authorities.

6. The authority granted in this order will not endanger or impair the operation of existing carriers contrary to the public interest.

7. After hearing upon the application and after giving reasonable consideration to the effect of the proposed operation upon existing carriers, the Commission concludes from the evidence that public convenience and necessity require the authorization of the proposed service as described below. Section 69-12-323(2), MCA. Accordingly, the Protestant's Motion to Dismiss is Denied.

ORDER

NOW, THEREFORE, IT IS ORDERED that the Application in Docket No. T-8784, as amended, is Granted in part and Denied in part. Applicant is granted the following authority:

Class B - packaged chemicals, between all points and places within the State of Montana.

LIMITATIONS: To packaged chemicals only, as opposed to in bulk.
Further limited to the accounts of West-Chem Ag Chemicals,
Agricultural Chemicals, Billings, Montana, or their successors in
interest.

IT IS FURTHER ORDERED, pursuant to Section 2-4-621, MCA, that this is a proposed order only. Any party has the opportunity to file exceptions to this initial decision, present briefs, and make oral arguments before the full Commission. Exceptions and supporting briefs must be filed with the Commission within twenty (20) days from the date of service of this proposed order.

BY ORDER OF THE PUBLIC SERVICE COMMISSION

TOM MONAHAN, Commissioner and
Hearing Examiner

ATTEST:

Trenna Scofield
Commission Secretary

(SEAL)